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No. 07-651

IN THE

Supreme Court of the United States

ENTERGY CORPORATION, *et al.*,
Petitioners,

v.

DAVID JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION

JOSEPH D. JAMAIL
FRANK STAGGS
JAMAIL & KOLIUS
500 Dallas Street
Suite 3434
Houston, TX 77002
(713) 651-3000

MICHAEL D. SYDOW
DYMRA R. HENDERSON
SYDOW & MCDONALD, LLP
4900 Woodway Drive
Suite 900
Houston, TX 77056
(713) 622-9700

H. BARTOW FARR, III
Counsel of Record
FARR & TARANTO
1220 19th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 775-0184

JOHN H. CONWAY
BRICKFIELD, BURCHETTE,
RITTS & STONE
1025 Thomas Jefferson
Street, N.W.
8th Floor, West Tower
Washington, D.C. 20007
(202) 342-0800

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the judgment below is final under 28 U.S.C. § 1257(a), when the Texas court of appeals, having determined that respondents may not challenge any wholesale rates or allocations under a tariff filed with the Federal Energy Regulatory Commission, remanded the case for further proceedings on the ground that respondents' state-law tort claims did not necessarily require such relief.

2. Whether, having determined that respondents may not challenge any wholesale rates or allocations under a tariff filed with the Federal Energy Regulatory Commission, the court of appeals properly concluded that the state courts could initially consider respondents' state-law tort claims insofar as they do not require such relief.

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STATEMENT

The petition in this case arises out of petitioners' preliminary motion to dismiss respondents' complaint for lack of subject matter jurisdiction. The state district court granted the motion, agreeing with petitioners' two-pronged argument that respondents' state-law tort claims were within the exclusive jurisdiction of the Federal Energy Regulatory Commission or the Texas Public Utility Commission. The court of appeals reversed. Although the court of appeals agreed that federal law barred claims challenging the reasonableness of FERC-regulated wholesale rates, it found that respondents' claims were not so directed and remanded for further proceedings on the merits.

The Texas Supreme Court denied review without opinion.

1. Respondents are consumers of electric power in Texas. They brought this tort suit in state court on behalf of themselves and other consumers, alleging that petitioners, which are all participants in an integrated power pool, had committed various improper acts related to purchases of electric power in the wholesale market.[1] They sought relief solely under state law, alleging that petitioners, among other things, had engaged in an unlawful conspiracy and breached their fiduciary duties to respondents. Pet. App. 4a-5a. In addition, respondents claimed that petitioners' activities violated the Texas Theft Liability Act. *Id.*; *see* Texas Civ. Prac. & Rem. Code Ann. § 134.001 *et seq*.

The allegations of the complaint fell into two main categories. First, respondents alleged that petitioners had engaged in various schemes "for the intended purpose of forcing Defendants' and [Entergy Gulf States'] customers (and the customers of other Operating Companies) to purchase more power from the Entergy System Pool than they should have, rather than using cheaper power available from non-Entergy companies." Plaintiffs' First Amended Original Petition, ¶26 (Tex. S. Ct. Petition for Review,

[1] Petitioners are the Entergy Corporation; Entergy Services, Inc.; Entergy Power, Inc.; Entergy Power Marketing Corp.; Entergy Arkansas, Inc.; and Entergy Gulf States, Inc. Respondents did not name Entergy Gulf States as a defendant, but the state district court granted Entergy Gulf States' motion to intervene over respondents' objection, and the court of appeals affirmed that ruling. Pet. App. 14a-16a. For simplicity, we use the term "petitioners" as though Entergy Gulf States had been a defendant from the outset of the litigation.

App. E). Second, respondents asserted that "Defendants' and [Entergy Gulf States'] after-the-fact accounting methods and computer programs have hidden and encouraged the improper purchasing decisions that resulted in Defendants' and [Entergy Gulf States'] customers paying more for power than they should have to the benefit of Defendants." *Id.*, ¶26. With respect to the latter claim, respondents alleged that "Defendants have intentionally understated the incremental costs [of power generation] in order to hide the excessive costs of their electric power purchases from themselves and affiliates and to hinder, frustrate, delay and/or avoid regulatory review of the reasonableness of their power purchases." *Id.*, ¶29.

Petitioners sought unsuccessfully to remove the case to federal court. *See Jenkins v. Entergy Corp.*, C.A. No. G-03-746 (S.D. Tex. 2004) (Tex. S. Ct. Response to Petition for Review, App. C). In granting respondents' motion to remand, the federal district court critically reviewed the allegations of the complaint, noting that respondents had challenged both petitioners' purchasing decisions at the wholesale level and their utilization of "creative accounting techniques to show that the high-cost power was sold to Texas residents when in fact it was not." Order at 2. The district court then concluded that, based on the claims as set forth in the complaint, petitioners had not established a proper basis for removal, rejecting their argument that respondents' claims "ultimately rest[ ] on whether or not the System Agreement, a FERC-approved tariff, was violated." Order at 4. Stating that "a violation of the tariff is not an essential element to any of [respondents'] claims," Order at 5, the court pointed out that respondents "can conceivably prove their state-law claims

by providing evidence that [petitioners] used fraudulent accounting techniques to overcharge customers." Order at 5.[2]

Back in state court, petitioners moved to dismiss the case for lack of subject matter jurisdiction, making many of the same tariff-based arguments that they had made before the federal court, but adding the additional argument that the Texas Public Utilities Commission had exclusive jurisdiction as well. The state district court granted the motion. Pet. App. 40a-41a. The court construed the complaint to "address[ ] matters governed by the Entergy System Agreement," Pet. App. 38a, and to assert damage claims based on the "difference between the price paid by [respondents] for electric service from [Entergy Gulf States] and the price they would have paid if available lower-priced power had been allocated to [Entergy Gulf States]." Pet. App. 38a. Then, based on that interpretation, the court determined that it had no jurisdiction over respondents' claims, finding that "FERC possesses exclusive jurisdiction over interpretation, violations, enforcement, and amendment of federal electric tariffs, and court actions (except for judicial review of FERC decisions) complaining of actions taken and decisions made under approved federal tariffs are preempted." Pet. App. 38a. The district court also concluded that the Texas Public Utility Commission had exclusive jurisdiction over the relief that respondents sought. Pet. App. 38a-39a.

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[2] The federal district court also found that there was no basis for finding "complete preemption" in this case. Order at 4 n.1. It noted that "[b]oth Parties" had agreed that complete preemption was inapplicable. *Id.*

2. The Texas court of appeals reversed. As an initial matter, the court of appeals found that the Texas Public Utility Commission had neither exclusive nor primary jurisdiction over the claims for relief. The court noted that "wholesale rates are subject exclusively to federal regulation," Pet. App. 20a, and that "the PUC cannot consider purchasing, selling or allocation decisions involving wholesale power sales where those decisions are made on an interstate basis between various companies." Pet. App. 23a. It also found that "the suit before us is inherently judicial in nature, in which Jenkins brings state law tort claims based on those interstate purchasing and allocation decisions." Pet. App. 23a.

The court of appeals turned next to the question whether FERC had exclusive jurisdiction over respondents' claims. The court recognized that "FERC has the 'exclusive authority to determine the reasonableness of wholesale [electricity] rates' under the Federal Power Act." Pet. App. 24a, quoting *Official Comm. of Unsecured Creditors of Mirant Corp. v. Potomac Elec. Power Co.*, 378 F.3d 511, 518 (5th Cir. 2004). It further acknowledged that "[u]nder the filed rate doctrine, 'the reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts,'" Pet. App. 24a-25a, quoting *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 375 (1988), and that "district courts are preempted from awarding breach of contract damage awards calculated using a rate other than the rate filed with FERC." Pet. App. 25a. The court added that "[m]any aspects of the interstate 'transmission' or 'sale' of wholesale energy pursuant to a federal tariff, and not merely matters involving rates, fall within FERC's exclusive jurisdiction." Pet. App. 25a. It thus observed that "[w]hether FERC has

exclusive jurisdiction under the Federal Power Act is . . . a close question dependent upon what exactly is in issue." Pet. App. 27a.

Against this background, the court of appeals considered whether, based on the record before it, respondents' claims fell within the field of exclusive FERC jurisdiction. Of particular importance here, the court expressly "agree[d] that the filed rate doctrine bars a claim that would require this Court to measure the difference between the allegedly fixed wholesale price and an otherwise 'just and reasonable wholesale price,' regardless of whether the claim itself is couched in state law terms." Pet. App. 32a. The court cited with approval *In re California Wholesale Electricity Antitrust Litigation*, 244 F. Supp.2d 1072, 1077 (S.D. Cal. 2003), *aff'd sub nom. Public Utility District No. 1 of Snohomish County v. Dynegy Power Mktg., Inc*, 384 F.3d 756 (9th Cir. 2004), where the federal court had rejected claims in which "the plaintiffs . . . sought as redress the difference between the charged rates and the different, hypothetical rates they believed would have 'been achieved in a competitive market.'" Pet. App. 33a, quoting *California Wholesale Electricity*, 244 F. Supp.2d at 1077. Nevertheless, while the Texas court of appeals acknowledged that claims seeking to question FERC-approved rates were within FERC's exclusive jurisdiction, it disagreed with the district court regarding whether respondents' allegations were dependent on such re-examination, finding that "this is not the measure of damage pursued by [respondents]." Pet. App. 32a; *id.* at 33a ("[s]uch is not the case here"). The court stated that respondents do "not challenge the rates or the FERC-approved formulas, but instead the discretionary decisions that directed who

would benefit from the cheaper power." Pet. App. 33a.[3]

Relying on FERC's own pronouncements, the court of appeals also observed "that FERC jurisdiction is not exclusive or preemptive in all circumstances." Pet. App. 27a. It quoted from a recent FERC order stating that "'the Commission's jurisdiction to consider disputes arising under jurisdictional tariffs does not as a matter of law preclude state courts from also entertaining such disputes in the appropriate circumstances.'" Pet. App. 28a, quoting Order No. 888-B, 81 FERC ¶ 61,248, at 62,081 (1997). To determine whether the circumstances were appropriate here, the court of appeals then looked to the three-part test that the Commission uses for determining whether it should assert jurisdiction over certain tariff disputes. *See* Pet. App. 28a, citing *Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (1979); note 12 *infra* (quoting test). The court noted that FERC had not specifically passed on the propriety of petitioners' purchasing decisions, Pet. App. 32a, 34a, and it "interpret[ed] the discretionary decisions in issue as being the type that do not impact or impair FERC's flexibility in approving cost-allocation arrangements." Pet. App. 32a. It thus concluded that the district court had erred in summarily dismissing the suit for lack of jurisdiction, and "remand[ed] for further proceedings." Pet. App. 36a. It recognized, however, that "FERC jurisdiction could potentially expand to encompass this dispute . . . ." Pet. App. 36a.

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[3] At the same time, the court acknowledged that "FERC-mandated allocations cannot be challenged except before FERC, and neither can discretionary decisions that would impact or impair FERC's flexibility in approving cost-allocation arrangements." Pet. App. 30a.

Petitioners sought review in the Texas Supreme Court, which called for full briefing on the questions raised in the petition. After reviewing the submissions, the Supreme Court denied the petition, *see* Pet. App. 1a, and subsequently denied a petition for rehearing as well. *See* Pet. App. 42a-43a.

ARGUMENT

Further review of this case would be both premature and unwarranted. It would be premature because the decision of the Texas court of appeals is an interlocutory one—deciding only that, based on the limited record before it, the state courts may exercise at least some jurisdiction over respondents' claims—and because none of the recognized grounds for treating interlocutory orders as final are present here. *See Cox Broadcasting v. Cohn*, 420 U.S. 469, 482 (1975); pages 9-11 and 24-25 *infra*. It would be unwarranted because, contrary to petitioners' central assertion, the court of appeals did *not* hold that Texas courts may second-guess the reasonableness of rates subject to FERC oversight, but decided just the opposite: "that the filed rate doctrine *bars a claim* that would require this Court to measure the difference between the allegedly fixed wholesale price and an otherwise 'just and reasonable wholesale price,' regardless of whether the claim itself is couched in state law terms." Pet. App. 32a (emphasis added). Far from disagreeing with numerous decisions of this Court and other federal and state courts, the Texas court of appeals explicitly aligned itself with the governing principles set forth in those cases, holding only that respondents' claims did not necessarily trespass into the forbidden category. *See* pages 11-18 *infra*. What the Texas courts have held so far, therefore, is that—once it is accepted that litigants are

not permitted to question FERC-approved rates—the Commission, by its own admission, does not have exclusive jurisdiction over all "disputes arising under jurisdictional tariffs," Order 888-B, 81 FERC ¶ 61,248, at 62,081 (1997), and that, given the particular nature of the dispute in this case, state courts can proceed to consider the state-law claims (and any more specific preemption arguments) in the first instance. *See* pages 18-24 *infra*. That ruling is not worthy of review at this point, and the petition should be denied.

1. The express terms of 28 U.S.C. § 1257(a) establish that this Court has jurisdiction to review only "[f]inal judgments or decrees" from state courts. *See Jefferson v. City of Tarrant*, 522 U.S. 75 (1997); *Johnson v. California*, 541 U.S. 428 (2004). "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.'" *City of Tarrant*, 522 U.S. at 81, quoting *Market Street R. Co. v. Railroad Comm'n of California*, 324 U.S. 548, 551 (1945). Here, the decision below is, by its nature, interlocutory: the Texas court of appeals decided only that the trial court should have denied petitioners' motion to dismiss for lack of jurisdiction, and it remanded the case for further proceedings on the merits. Under the usual standards, that is not a "final" judgment. *See, e.g.*, *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982) ("[b]ecause the Colorado Supreme Court . . . remanded this case for trial, its decision is not final 'as an effective determination of the litigation'") (quoting *Market Street R. Co.*, 324 U.S. at 551).

To establish finality, petitioners rely, in part, on the well-known decision in *Cox Broadcasting*, which held that interlocutory judgments can be considered final for purposes of 28 U.S.C. § 1257(a) in certain limited circumstances. *See* Pet. 13; *Cox Broadcasting*, 420 U.S. at 476-85.[4] Although petitioners do not identify the particular *Cox Broadcasting* exception that they intend to invoke, the only plausible candidate appears to be the fourth exception, which requires, among other things, a showing that "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" and a further showing that "a refusal immediately to review the state-court decision might seriously erode federal policy." 420 U.S. at 482-83.[5] But petitioners cannot meet either of those require-

[4] Petitioners also rely on *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988), which applied *Cox Broadcasting* to a decision of the Mississippi Supreme Court reviewing an order of the Mississippi Public Service Commission. We discuss that case, and its bearing on finality here, at page 14 and note 7 *infra*.

[5] This Court in *Cox Broadcasting* noted that it had reviewed judgments from state courts, *inter alia*, in "situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 482-83.

ments. As we discuss below, petitioners' arguments for "litigation-precluding" preemption depend, for the most part, on a plain misreading of the court of appeals' decision, which actually agreed with petitioners on their primary preemption argument but nonetheless determined that further proceedings were appropriate. Moreover, read properly, that decision reveals that the Texas courts did not flout "federal policy" but instead went to considerable lengths to respect and accommodate FERC authority, relying upon a jurisdictional inquiry formulated by FERC itself. There is thus no need for review by this Court, much less "immediate[ ]" review.

2. The petition in this case has a dominant theme: that the Texas court of appeals has authorized Texas juries to second-guess the FERC-regulated wholesale rates charged by petitioners and to award damages based on the difference between those rates and hypothetical "reasonable" rates (that is, rates recalculated to eliminate the effects of petitioners' wrongdoing under state law). Thus, the "Question Presented" asks whether "a state court may determine that the bulk power supply arrangements of an interstate power pool governed by a FERC tariff violate state tort law and may award retail customers damages based on what their electricity rates would have been if the interstate power pool operated in the manner that the state court jury finds prudent." Pet. (i). Later, petitioners criticize the court of appeals for holding, among other things, "that a state court may order the Entergy System to pay EGSI's retail ratepayers the full amount of whatever portion of the[ ] wholesale charges are found excessive by a jury." *See* Pet. 17. Proceeding from this re-characterization, petitioners argue at length that the decision below is

in conflict with numerous cases from this Court and other federal and state courts. Pet. 17-27.

Petitioners' reading of the court of appeals' holding, however, is demonstrably incorrect. Instead of allowing respondents to challenge the reasonableness of FERC-regulated rates, the court of appeals expressly held that respondents could *not* do so: "the filed rate doctrine bars a claim that would require this Court to measure the difference between the allegedly fixed wholesale price and an otherwise 'just and reasonable wholesale price,' regardless of whether the claim itself is couched in state law terms." Pet. App. 32a; *see also* Pet. App. 24a-25a ("[u]nder the filed rate doctrine, 'the reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts,'" quoting *Mississippi Power & Light*, 487 U.S. at 375). In reaching this conclusion—which is not quoted anywhere in the petition—the court below cited to, and specifically relied on, a recent federal case that had found preemption of just such claims. *See* Pet. App. 32a, citing *In re California Wholesale Electricity Antitrust Litigation*, 244 F. Supp. 2d 1072, 1078 (S.D. Cal. 2003), *aff'd sub nom. Public Utility Dist. No. 1 of Snohomish County v. Dynergy Power Mktg, Inc.*, 384 F.3d 756 (9th Cir. 2004). Noting that the plaintiffs in *California Wholesale Electricity* had "sought as redress the difference between the charged rates and the different, hypothetical rates they believed would have 'been achieved in a competitive market,'" Pet. App. 33a, the Texas court of appeals recognized that, "[b]ecause the court would be 'expressly required to assume a hypothetical rate different from that actually set by FERC,' FERC jurisdiction prevailed." Pet. App. 33a, quoting *California Wholesale Electricity*, 244 F. Supp. 2d at 1077 (some internal quotation marks omitted). The

court distinguished that decision, not because it disagreed with the governing legal principle, but because it found that the claims in this case were of a different nature. *See* Pet. App. 33a ("[s]uch is not the case here"); *see also* Pet. App. 32a ("this is not the measure of damage pursued by Jenkins").

The legal analysis of the Texas court of appeals is thus in line with, rather than in conflict with, the numerous cited decisions of this Court and other federal and state courts. *See* Pet. 17-27. Those cases, like the decision below, stand for the established principle that neither state utility commissions nor plaintiffs asserting state-law claims may seek to substitute a new, "reasonable" wholesale rate for the rate contained in a FERC-approved tariff, or attempt to alter the allocations of power set forth in such a tariff.[6] For example, in *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39 (2003), the case on which petitioners most heavily rely, this Court held that the Louisiana Public Service Commission, in setting retail rates, could not disallow certain tariff-based costs that were passed through to the retail utility by a wholesale seller. The Court noted that "[t]he filed rate doctrine requires 'that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates,'" 539 U.S. at 47, quoting *Nantahala Power & Light Co.*

[6] In addition to its statement with respect to rates, the Texas court of appeals declared that respondents could not challenge allocations made to Entergy Gulf States under the System Agreement. *See* Pet App. 30a. The court remarked that "[c]learly, FERC-mandated allocations cannot be challenged except before FERC, and neither can discretionary decisions that would impact or impair FERC's flexibility in approving cost-allocation arrangements." *Id.*

v. Thornburg, 476 U.S. 953, 962 (1986), and it rejected the idea that state commissions could effectively posit a different, lower wholesale rate for the purposes of determining allowable costs at the retail level. *See* 539 U.S. at 49-50.

The earlier decisions in *Mississippi Power & Light* and *Nantahala Power and Light* rested upon the same basic notion. In *Nantahala Power & Light,* the Court overturned a decision of the North Carolina Supreme Court that had allowed state regulators to deny recovery of certain costs incurred at the wholesale level and passed through to the retail seller, stating plainly that "[w]hen FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. . . . Such a 'trapping' of costs is prohibited." 476 U.S. at 970. *See also id.* at 971 (state commission order would impermissibly require utility to "calculate its retail rates as if it received more [low-cost] entitlement power then it does under FERC's order"). Similarly, in *Mississippi Power & Light*, the Court held that the Mississippi Public Service Commission could not partially disallow recovery of the designated wholesale rate on the basis that it reflected an imprudent assumption of costs by the wholesale seller. Relying on *Nantahala Power & Light*, the Court declared that "FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates." 487 U.S. at 371.[7]

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[7] The preemption argument in *Mississippi Power & Light*, once adopted by this Court, necessarily meant that the Public

The Ninth Circuit cases relied on by petitioners are similar. Indeed, petitioners themselves describe the "conflicting" Ninth Circuit cases as holding that the Federal Power Act "preempts state law claims that wholesale costs incurred under FERC rate schedules were artificially inflated and that seek to recover the difference between those costs and the lower costs that would have been incurred if the utilities had complied with the purported state law standards." Pet. 24, citing *Public Utility District No. 1 v. Dynergy Power Mktg., Inc.*, 384 F.3d 756, 760-62 (9th Cir. 2004); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831. 851-53 (9th Cir. 2004), *amended by* 387 F.3d 966 (9th Cir. 2004), *cert. denied*, 544 U.S. 974 (2005). Thus, in *Public Utility District No. 1*, the Ninth Circuit expressly noted that the plaintiff's claims "ask[ed] the district court to determine the rates that 'would have been achieved in a competitive market,'" 384 F.3d at 761, relief that the court found to be "barred by the filed rate doctrine, by field preemption, and by conflict preemption." *Id.*[8] In *California ex rel. Lockyer*, while the plaintiff did not

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Service Commission's attempt to redefine wholesale costs was foreclosed, thus satisfying the fourth *Cox Broadcasting* exception. *See* pages 10-11 *supra*. By contrast, the decision below held that, *even accepting* petitioners' preemption argument with respect to the impermissibility of recalculating wholesale costs, the state courts had jurisdiction to consider respondents' claims to the extent that they did not require such prohibited relief. *See* Pet. App. 32a-33a.

[8] As we have noted, the Texas court of appeals—in holding that the filed rate doctrine bars claims based on an alleged difference between FERC-approved tariff rates and a hypothetical "reasonable" rate, *see* Pet. App. 32a—specifically relied on the district court decision in *California Wholesale Electricity*, which the Ninth Circuit then affirmed in *Public Utility District No. 1*.

seek to revise a wholesale rate, it did seek to modify a FERC-approved tariff by adding remedies for breach that were over and above those expressly set out in the tariff itself. The Ninth Circuit found that the "California claims are preempted because they encroach upon the substantive provisions of the tariff, an area reserved exclusively to FERC, both to enforce and to seek remedy." 375 F.3d at 852.

The remaining cases from federal courts of appeals and state supreme courts, to the extent relevant at all,[9] likewise acknowledge the inappropriateness of basing damages, or recalibrating retail rates, on a second-guessing of FERC-established tariff obligations. In *Appalachian Power Co. v. Arkansas Pub. Serv. Comm'n*, 812 F.2d 898 (4th Cir. 1987), the court of appeals held that States may not "exert authority that potentially conflicts with FERC determinations regarding rates or agreements affecting rates." 812 F.2d at 904. In *Transmission Agency v. Sierra Pac. Power Co.*, 295 F.3d 918 (9th Cir. 2002), the Ninth Circuit noted that neither state nor federal courts could "assume[ ] a hypothetical rate different from

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[9] Two of the federal cases—*South Dakota Pub. Utils. Comm'n v. FERC*, 690 F.2d 674 (8th Cir. 1982), and *Anaheim, Cal. v. FERC*, 669 F.2d 799 (D.C. Cir. 1981)—are direct appeals from FERC orders and do not address questions about the concurrent jurisdiction of state courts. A third case—*Middle South Energy, Inc. v. Ark. Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985)—held that state discrimination against out-of-state sellers is barred by the negative Commerce Clause, a holding that has little relation to the issues here. And, in *Public Serv. Co. v. Patch*, 167 F.3d 15 (1st Cir. 1998), the First Circuit agreed that a state commission could review the prudency of purchases by retail utilities—so long as the utility had a choice of suppliers—but found that no such issue had been raised in that case. *See* 167 F.3d at 27.

that actually set by FERC," 295 F.3d at 930, ultimately concluding that it could not reassess a FERC decision regarding power allocation. And the state cases uniformly reject attempts by state utility commissions to disregard tariffed wholesale rates or FERC-approved allocations in setting retail rates. *See, e.g., General Motors Corp. v. Illinois Commerce Comm'n*, 574 N.E.2d 650, 658 (Ill. 1991) ("the filed rate doctrine prohibits State prudence review of FERC-mandated costs"); *Eastern Edison Co. v. Dept. of Pub. Utils.*, 446 N.E.2d 684, 690 (Mass. 1983) ("the Federal Power Act precludes [state] review of the reasonableness of the [wholesale seller's] rate"); *Northern States Power Co. v. Hagen*, 314 N.W.2d 32, 38 (N.D. 1981) (state commission cannot inquire into "reasonableness of [wholesale] rates as an operating expense").[10]

Like those state and federal courts, the court of appeals below was fully cognizant of, and expressly agreed with, the principle that respondents could not question the FERC-regulated tariff rates or the allocations made to Entergy Gulf States. Its disagreement with petitioners rested on a quite different issue: whether it was clear, on the basis of the record, that all of respondents' claims depended on that kind of inquiry. Pet. App. 32a-33a. Although the complaint refers to inflated costs at the wholesale level, it also makes allegations about the misuse of computer

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[10] *See also Maine Yankee Atomic Power Co. v. Maine Pub. Utils. Comm'n*, 581 A.2d 799, 804 (Me. 1990) (state agency "has no authority to require a reduction in a component of [retail utility's] rates, set exclusively by FERC"); *Northern States Power Co. v. Minnesota Pub. Utils. Comm'n*, 344 N.W.2d 374, 382 (Minn. 1984) ("the state utilities commission is required to treat the [FERC-] allocated abandonment costs as expenses for power purchased in determining the retail rates").

programs and improper concealment of actual costs, activities that are themselves unlawful under state law. *See* Plaintiffs' First Amended Original Petition, ¶¶ 26, 29; *see also Jenkins v. Entergy Corp.*, C.A. No. G-03-746 (S.D. Tex. 2004) (remand Order) at 5 (respondents "can conceivably prove their state-law claims by providing evidence that [petitioners] used fraudulent accounting techniques to overcharge customers"). Furthermore, the kinds of relief sought by respondents would not necessarily require that state courts measure damages by calculating the spread between the tariff rate and a rate free from the effects of tortious behavior. For example, respondents have sought relief under the Texas Theft Liability Act, which provides for statutory damages up to $1,000. *See id.*, ¶¶ 34-36; Tex. Civ. Prac. & Rem. Code Ann. §134.005(a)(1). Given the narrow scope of the issues raised by the motion to dismiss, the Texas court of appeals did not pass on the validity of those claims as a matter of state law, leaving them to be addressed in the first instance on remand. *See* Pet. App. 36a. If petitioners believe that their preemption arguments call for additional limits on respondents' claims, those questions are best considered after the lower courts have more fully addressed the precise nature of those claims and remedies.

3. Petitioners also make the broad suggestion that all aspects of their purchasing decisions—including, apparently, any improper computer or bookkeeping operations—are within the terms of the System Agreement and, as a consequence, are subject only to FERC's jurisdiction. *See* Pet. 6-8, 21. Here again, the Texas court of appeals explicitly acknowledged that FERC has extensive authority over issues that may arise under FERC tariffs. *See* Pet. App. 25a-

27a. The court pointed out that "[m]any aspects of the interstate 'transmission' or 'sale' of wholesale energy pursuant to a federal tariff, and not merely matters involving rates, fall within FERC's exclusive jurisdiction." Pet. App. 25a, citing *California ex rel. Lockyer*, 375 F.3d at 851. Likewise, it observed that "the filed rate doctrine is not limited 'to rates per se or FERC orders that deal in terms of prices or volumes or purchases.'" Pet. App. 25a, quoting *California ex rel. Lockyer*, 375 F.3d at 851.

The court of appeals correctly noted, however, that FERC does not have—or even claim to have—exclusive jurisdiction over *all* matters that may be related to tariffed activities at the wholesale level. Pet. App. 27a. FERC itself has said that "the Commission's jurisdiction to consider disputes arising under jurisdictional tariffs does not as a matter of law preclude state courts from also entertaining such disputes in the appropriate circumstances." Order 888-B, 81 FERC ¶ 61,248, at 62,081 (1997); *Portland General Electric Co.*, 72 FERC ¶ 61,009, at 61,021 (1995); *see also* Pet. App. 27a ("[w]hether FERC has exclusive jurisdiction under the Federal Power Act is . . . a close question dependent upon what exactly is in issue"). FERC orders likewise have recognized that the "field" of the Commission's exclusive jurisdiction does not extend to every question that might bear on how tariff-related activities are conducted. For example, FERC recently declined to exercise jurisdiction over a contractual dispute between a wholesale seller and buyer, stating that "because [the buyer's] complaint 'only seeks enforcement of an existing contract, and not the setting of a new just and reasonable rate,' the case 'does not fall within the Commission's exclusive jurisdiction.'" *Water and Power Department of the City of Glendale, California*

v. Portland General Electric Co., 113 FERC ¶ 61,285, at 62,153 (2005), quoting *Kentucky Utilities*, 110 FERC ¶ 61,285, at 62,101 (2005).[11] *See California Department of Water Resources*, 121 FERC ¶ 61,191, at PP 44-45 (2007); *Constellation Energy Commodities Group, Inc.*, 119 FERC ¶ 61,292, at P. 22 (2007); *see also Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961); *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1471-72 (5th Cir. 1987).

To determine whether it will exercise jurisdiction over tariff-related matters, FERC has traditionally relied upon a three-part test set forth in *Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (1979).[12] As the court below pointed out, *see* Pet. App. 28a, that test not only raises questions about the need for agency expertise and uniformity, *see id.*, but also looks to "whether the case is important in relation to the regulatory responsibilities of FERC." *Id.* It is self-evident that FERC could not resolve every dispute that arises under the myriad of federal tariffs filed before it, or that somehow might bear on

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[11] Respondents' complaint does not make any claims based upon "textual violations of the System Agreement." *See* Pet. App. 33a. Petitioners have raised the terms of the System Agreement, however, as part of their preemption defense.

[12] The Commission stated that "[w]hether the Commission should assert jurisdiction over contractual issues otherwise litigatable in state courts, depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission." *Ark. La. Gas Co.*, 7 FERC ¶ 61,175, at 61,322.

activities contemplated under those tariffs, and it is also clear that, so long as their scrutiny does not interfere with primary federal authority, states have a legitimate interest in applying their own laws. *See* Order 888-B, 81 FERC ¶ 61,248, at 62,081 (acknowledging "the possibility that tribunals other than the Commission may be called upon to adjudicate disputes arising from service under the tariff"); *see generally New York v. FERC*, 535 U.S. 1, 28 (2002) (upholding FERC decision not to exercise exclusive jurisdiction over "the transmission component of a bundled retail sale" in light of "the complicated nature of the jurisdictional issues"). Thus, the Commission typically has chosen to exercise its non-exclusive jurisdiction only where its oversight is important to the federal regulatory scheme. *See, e.g.*, *California Department of Water Resources*, 121 FERC ¶ 61,191, at P. 45.

The court of appeals below, in trying to weigh the possible effects of state jurisdiction upon the authority granted to the Commission, used the Commission's own test as a framework for determining whether the Texas courts could address respondents' claims. It ultimately concluded that adjudication of the claims at issue—provided that they were construed not to seek a recalculation of wholesale rates—would "not impact or impair FERC's flexibility in approving cost-allocation arrangements." Pet. App. 32a. The court of appeals pointed out that respondents do not challenge *sales* by petitioners at the wholesale level, or the rates at which those sales were made, but rather antecedent discretionary decisions about scheduling the *purchase* of electric power, as well as the use of computer programs and accounting practices to mask the real effects of those transactions. *See* Pet. App. 31a-32a. It reasoned

that, so long as respondents were not permitted to question the subsequent rates, consideration of respondents' claims would not interfere with FERC's ability to exercise control over exclusively federal issues. *See id.*

The supposedly contrary FERC decisions cited by petitioners (Pet. 21 n.6) actually support this conclusion. *See Portland General Electric*, 72 FERC ¶ 61,009, at 61,021; *Northern States Power Co. v. Southern Minnesota Municipal Power Agency*, 55 FERC ¶ 61,101, at 61,343-44 (1991); *Southern Co. Services, Inc.*, 37 FERC ¶ 61,256, at 61,652 (1986). In those decisions, the Commission made clear, *first*, that it "has exclusive jurisdiction to determine the reasonableness of rates for the sale of electricity at wholesale in interstate commerce by public utilities . . .," *Portland General Electric*, 72 FERC ¶ 61,009, at 61,020; *see Northern States Power*, 55 FERC ¶ 61,101, at 61,343 n.5; *Southern Co. Services*, 37 FERC ¶ 61,256, at 61,652, and, *second*, that "[w]ith respect to breach of contract claims arising under state law, the Commission does not possess exclusive jurisdiction." *Southern Co. Services*, 37 FERC ¶ 61,256, at 61,652; *see Portland General Electric*, 72 FERC ¶ 61,009, at 61,021. As a result, whereas the Commission went on to exercise its exclusive jurisdiction over a claim that "would require the Commission to reform the contracts in order for the contracts to be just and reasonable," *Northern States Power*, 55 FERC ¶ 61,101, at 61,344, and over certain claims that "touch upon the reasonableness of the rates under agreements that are subject to our jurisdiction," *Southern Co. Services*, 37 FERC ¶ 61,256, at 61,652, it *declined* to exercise jurisdiction over tariff matters that did not immediately bear on the reasonableness of FERC-regulated rates or conditions.

See Portland General Electric, 72 FERC ¶ 61,009, at 61,021 ("[t]he complaint in state court does not challenge the reasonableness of [the utility's] rates under the Power Agreement, or any term and condition of service"); *Southern Co. Services*, 37 FERC ¶ 61,256, at 61,652 ("[w]ith respect to Gulf States' allegation that the Southern Companies have not acted in good faith, the question is not one which appears to implicate technical expertise, nor is it one which is central to our regulatory responsibilities"). Here, of course, the Texas court of appeals has already made the determination that respondents' claims do not—indeed, under the filed rate doctrine, cannot—attack the reasonableness of the rates charged by petitioners at the wholesale level. *See* Pet. App. 32a-33a.[13]

Petitioners do not argue that the court of appeals misapplied the *Hall* test (they do not mention the test at all), nor did they do so before the Texas Supreme Court. And, in any event, that question is of no general importance: the conclusion reached by the Texas court of appeals is not binding on the Commission, and the Commission is free to assert jurisdiction over the subject matter of respondents' claims if it wants to do so. The Texas court of appeals, in fact, expressly acknowledged that possibility, pointing out that, despite its ultimate decision that the state courts had jurisdiction to consider the claims in this action, "FERC jurisdiction could potentially expand

[13] Although this case does not directly involve claims of tariff violation, *see* note 11 *supra*, state courts may also have concurrent jurisdiction to consider whether wholesale sellers have failed to comply with the terms of their tariffs. In *Entergy Louisiana*, this Court did not "address the question of the exclusivity of FERC's jurisdiction to determine whether and when a filed rate has been violated," 539 U.S. at 51, finding that it had not been presented on the record in that case. *Id.*

to encompass this dispute . . . ." Pet. App. 36a. Thus, it appears that, if petitioners were to seek a FERC determination that respondents' complaint raises matters within its jurisdiction, and FERC decided to address those questions, state court jurisdiction might ultimately give way.

4. There is nothing in the decision below, therefore, to indicate that, absent "immediate[ ]" review, federal policy will be "seriously erode[d]." *Cox Broadcasting*, 420 U.S. at 483. At this intermediate stage of the litigation, petitioners have at least two potential avenues open to them. They may press their state and federal arguments on remand, including arguments that particular claims or forms of relief have been limited by the ruling below. Or, if they choose, they may seek to file a petition with the Commission, asking it to determine whether it should exercise jurisdiction over the activities at issue in the lawsuit. Given those options, interlocutory review by this Court is neither necessary nor justified.

The final judgment requirement is "not one of those technicalities to be easily scorned." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Rather, "[i]t is an important factor in the smooth working of our federal system." *Id.* *See also Costarelli v. Massachusetts*, 421 U.S. 193, 196 (1975) (rule "prevent[s] our interference with state proceedings when the underlying dispute may be otherwise resolved"). As this Court has said: "The finality requirement of 28 U.S.C. § 1257 . . . serves several ends: (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to leave at a bare mini-

mum federal intrusion in state affairs." *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). As a result, "[c]ompliance with the provisions of § 1257 is an essential prerequisite to our deciding the merits of a case brought here under that section." *Johnson*, 541 U.S. at 431.

"A petition for certiorari must demonstrate to this Court that it has jurisdiction to review the judgment." *Id.* Here, although petitioners have made sweeping claims of preemption, the crux of their claims to "field" preemption—that the Texas courts have allowed the second-guessing of FERC wholesale rates—rests upon a patent misreading of the decision below. Yet, read correctly, the court of appeals' opinion amounts to no more than a preliminary determination that, at this stage of the litigation and in the absence of any action by FERC, the state courts may assert initial jurisdiction over respondents' tort claims without impairing the exercise of FERC's paramount authority over wholesale rates and practices. That narrow ruling does not pose an imminent threat to "federal policy," *Cox Broadcasting*, 420 U.S. at 483, and the petition does not merit review at this stage.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH D. JAMAIL
FRANK STAGGS
JAMAIL & KOLIUS
500 Dallas Street
Suite 3434
Houston, TX 77002
(713) 651-3000

MICHAEL D. SYDOW
DYMRA R. HENDERSON
SYDOW & MCDONALD, LLP
4900 Woodway Drive
Suite 900
Houston, TX 77056
(713) 622-9700

H. BARTOW FARR, III
Counsel of Record
FARR & TARANTO
1220 19th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 775-0184

JOHN H. CONWAY
BRICKFIELD, BURCHETTE,
RITTS & STONE
1025 Thomas Jefferson
Street, N.W.
8th Floor, West Tower
Washington, D.C. 20007
(202) 342-0800